



IN THE
Supreme Court of the United States
OCTOBER TERM, 1942

No. 962

JOSEPH MESSALL,

Petitioner-Appellant,

vs.

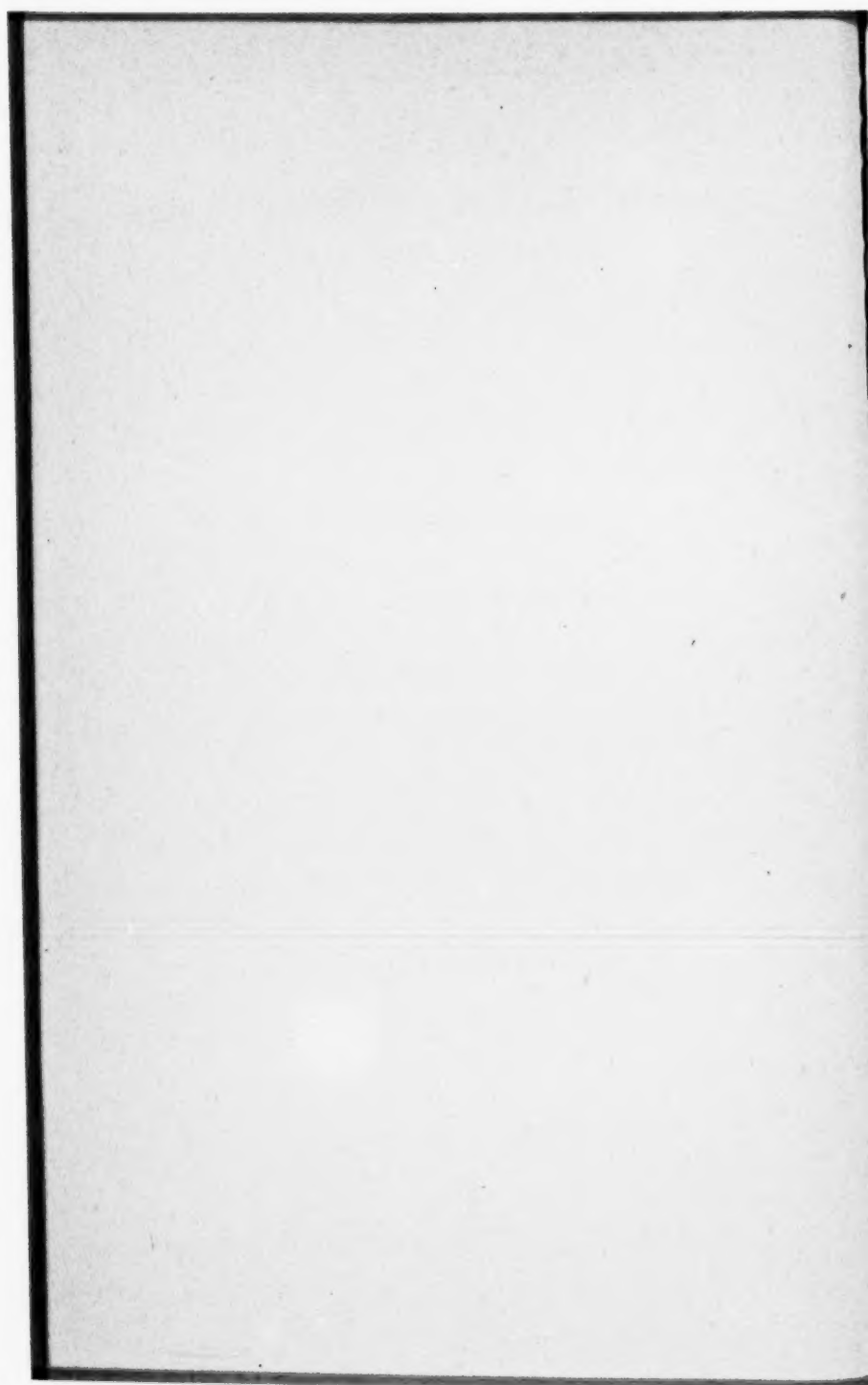
W. T. GRANT COMPANY, A CORPORATION,

Respondent-Appellee.

**MOTION OF ELMER McCLAIN FOR LEAVE TO
FILE BRIEF AS AN AMICUS CURIAE
with
PROPOSED BRIEF**

Of Counsel

EDWARD LAMB,
1014 Edison Building,
Toledo, Ohio.



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To the Honorable Justices of the United States Supreme
Court:

Elmer McClain moves that he be given leave, as an *amicus curiae*, to file his brief in the above entitled cause, now pending before this Court on a petition by the appellant for rehearing.

In support of this motion, applicant-for-leave would show:

He is a member of the bar of the State of Ohio and of this Court, for some time has been and now is engaged, in the State of Ohio, as legal counsel for organized work-

ers in said state numbering approximately 500,000, and in advising with respect to negotiation for, and enforcement, assertion and defense of rights of employees, fixed by law or contract.

This motion is made in good faith, without intent of delay and, to avoid delay, printed copies of the brief which the applicant desires leave to file are tendered herewith for filing on leave granted.

This case is now pending in this Court on the petition of appellant for rehearing on his petition for writ of certiorari denied May 24, 1943.

The questions which applicant seeks to brief arise on certain facts and holdings of the United States Circuit Court of Appeals for the Seventh Circuit, as stated and shown in its opinion rendered in this case January 25, 1943, and reported in 133 Fed. (2d) 209, particularly on the following facts and holdings:

Facts

Appellant while in the employ of the appellee in Columbus, Ohio, in November and December of 1936, worked in temperatures differing as much as 40 degrees, from 7:30 A. M. to 11:00 P. M. on week days and from 9:00 A. M. to 4:00 P. M. on Sundays, for a period of six weeks. The appellant suffered an illness and injury to health, beginning during such period, which he claimed resulted from the long hours and exposure to varying temperatures in appellee's store. Appellant relies on 103 Ohio Laws, p. 99, Section 15 (Throckmorton's Ohio Code, Baldwin's 1936 Edition, Section 871—15) to support his claim that appellee owed a duty to regulate hours

and temperatures in the interest of the health and welfare of employees.

Holdings Questioned

The opinion of the Circuit Court of Appeals held that the duty of the appellee to appellant under, or notwithstanding, the Ohio statute was limited to reasonable care to eliminate defects in the physical equipment used.

The applicant desires particularly to brief the following propositions:

(1) The law of Ohio referred to in the opinion (Section 871—15 Gen. Code Ohio, 103 Ohio Laws p. 99, Section 15) governed the appellee's duty, on the authority of *Erie Railroad Co. vs. Tompkins* 304 U. S. 64.

(2) Such Ohio law creates a duty commensurate with the scope of its language including a duty, not existing at common law in Ohio, for such regulation of hours with respect to the health and welfare of the employee and maintenance of such reasonable temperatures as the nature of the employment permits.

(3) Under the unreversed decision of the Supreme Court of Ohio, the Ohio statute is valid and effective notwithstanding general language by which it defines employer-duties.

(4) The Ohio law requires reasonable protection of the health and welfare of the employee not only against physical conditions which make a place unsafe but against anything in the employment which creates a risk to health and welfare.

The interest of the applicant and those whom he represents is not in the result of the litigation but is limited to the particular questions herein relating to the duty of the appellee as an employer in the State of Ohio.

The opinion stands as an authority on such questions, at least in the federal jurisdiction, is in direct conflict with the applicable law and cases cited and relied on in the proposed brief, destroys the force and effect of difficult and slow legislative gains in behalf of employees, not only in Ohio, but in numerous other states where similar general laws have been enacted, and further nullifies the effect of much litigation which ultimately resulted in judicial interpretation in Ohio and elsewhere sustaining the scope of protection contended for by the employees under such law and laws.

The importance of the decision in such respects is far-reaching and significant.

Respectfully submitted,

ELMER McCLAIN.

STATE OF OHIO
COUNTY OF LUCAS

SS:

Elmer McClain, of Lima, Ohio, personally appeared before me, a notary public in and for said county and state and being duly sworn upon his oath deposes and says that the matters and things in the motion above set out are true in substance and in fact as he verily believes; done this day of June, 1943.

Dorothy Tully,
Notary Public

My commission expires
January 19, 1946.

